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JAMES MCMANUS

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

JAMES MCMANUS, individually )  
and as a representative of a class ) CASE NO. 4:23-cv-05325-YGR  
of participants and beneficiaries )  
on behalf of The Clorox Company )  
401(k) Plan, ) **FIRST AMENDED CLASS  
ACTION COMPLAINT**

Plaintiff, )  
v. )

THE CLOROX COMPANY; THE )  
EMPLOYEE BENEFITS )  
COMMITTEE OF THE CLOROX )  
COMPANY 401(K) PLAN; and )  
DOES 1 to 10 inclusive, )

Defendants. )  
\_\_\_\_\_ )

1           1.     The Employee Retirement Income Security Act (“ERISA”) requires a  
2     fiduciary to act “solely in the interest of participants” and to do so with “the care,  
3     skill, prudence, and diligence” of a prudent person. 29 U.S.C. § 1104(a)(1).

4           2.     These statutory commands are violated where, as here, the employer  
5     (1) is both the plan sponsor and plan administrator, (2) is faced with a conflict of  
6     interest in choosing between allocating plan assets toward offsetting its own  
7     contributions to the plan or defraying plan expenses that would otherwise be borne  
8     by plan participants, (3) fails to conduct any investigation as to which choice would  
9     be in the best interest of the participants, and (4) decides to allocate the plan assets  
10    toward reducing its own plan contributions because that choice best serves its own  
11    self interests.

12          3.     Plaintiff JAMES MCMANUS (“Plaintiff”), a participant in the Clorox  
13    Company 401(k) Plan (“Plan” or “Clorox Plan”), brings this action on behalf of the  
14    Plan under 29 U.S.C. §§ 1132(a)(2) and (a)(3), and under Rule 23 of the Federal  
15    Rules of Civil Procedure as a representative of a class of participants and  
16    beneficiaries of the Plan, against Defendants THE CLOROX COMPANY (“Clorox”  
17    or the “Company”) and THE EMPLOYEE BENEFITS COMMITTEE OF THE  
18    CLOROX COMPANY 401(K) PLAN (the “Committee”) for breaching their  
19    fiduciary duties in violation of ERISA.

### 20                           **JURISDICTION AND VENUE**

21          4.     This Court has federal question subject matter jurisdiction  
22    under 28 U.S.C. § 1331 because this is an action under 29 U.S.C. §§  
23    1132(a)(2) and (3) for which federal district courts have exclusive  
24    jurisdiction under 29 U.S.C. § 1132(e)(1).

25          5.     This district is the proper venue for this action under 29  
26    U.S.C. § 1132(e)(2) and 28 U.S.C. § 1391(b)(2) because a substantial part  
27    of the events or omissions giving rise to the claim occurred here.

28    ///

**PARTIES**

6. The Clorox Plan is a defined contribution, individual account, employee pension benefit plan under 29 U.S.C. § 1002(2)(A) and § 1002(34) and is subject to the provisions of ERISA pursuant to 29 U.S.C. § 1003(a).

7. Defendant Clorox is a manufacturer of consumer cleaning and home care products headquartered in Oakland, California.

8. Clorox is both the Plan sponsor under 29 U.S.C. § 1002(16)(B) and the Plan administrator under 29 U.S.C. § 1002(16)(A) with broad authority over the administration and management of the Plan.

9. The Committee was created by Clorox to assist in the management of the Plan and was delegated with discretionary authority to administer and interpret the Plan.

10. Clorox and the Committee (together “Defendants”) are both named fiduciaries of the Plan and each exercised discretionary authority and discretionary control over the management and administration of the Plan with respect to the matters alleged herein and were fiduciaries of the Plan within the meaning of 29 U.S.C. § 1002(21)(A).

11. Plaintiff is a resident of California, was previously employed by Clorox in California, and is a current participant of the Plan whose account has been charged with a share of the Plan’s administrative expenses.

12. The defendants sued by the fictitious names DOES 1 through 10, inclusive, are Plan fiduciaries unknown to Plaintiff who exercise or exercised discretionary authority or discretionary control respecting the management of the Plan, exercise or exercised authority or control respecting the management or disposition of its assets, or have or had discretionary authority or discretionary responsibility in the

1 administration of the Plan and are responsible or liable in some manner  
2 for the conduct alleged in the complaint. Plaintiff will amend this  
3 complaint to allege the true names and capacities of such fictitiously  
4 named defendants when they are ascertained.

5 **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS**

6 13. As required by 29 U.S.C. § 1102(a)(1), the Clorox Plan is  
7 maintained under a written document.

8 14. In accordance with 29 U.S.C. § 1103(a), the assets of the  
9 Clorox Plan are held in a trust fund.

10 15. The Plan is funded by a combination of wage withholdings by  
11 Plan participants and Company matching and non-elective  
12 contributions, each of which is deposited into the Plan's trust fund.

13 16. Participants who contribute to the Plan receive a Company  
14 matching contribution of 100% of salary deferrals, up to a maximum of  
15 4% of covered compensation.

16 17. Participants also receive a non-elective Company contribution  
17 in the amount of 6% of covered compensation.

18 18. Upon their deposit into the Plan's trust fund, all participant  
19 contributions and Company contributions become assets of the Plan.

20 19. As an individual account, defined contribution retirement  
21 plan, the Clorox Plan "provides for an individual account for each  
22 participant and for benefits solely upon the amount contributed to the  
23 participant's account, and any income, expenses, gains and losses, and  
24 any forfeiture of accounts of other participants which may be allocated to  
25 such participant's account." 29 U.S.C. § 1002(34).

26 20. Participants in the Clorox Plan are immediately vested in  
27 their own contributions and the Company's matching contributions,  
28 along with any income or losses on those balances.

1           21. The Company's non-elective contributions, plus any income or  
2 losses on those balances, vest in varying rates over a period of 5 years.

3           22. When a participant has a break in service prior to full vesting  
4 of the Company's non-elective contributions, the participant forfeits the  
5 balance of unvested Company contributions in his or her individual  
6 account and Defendants, as the Plan's fiduciaries, exercise discretionary  
7 authority and control over how these Plan assets (called "forfeitures") are  
8 thereafter reallocated.

9           23. The Plan incurs expenses for general Plan administrative  
10 services such as legal, accounting, and/or recordkeeping services. To pay  
11 for these expenses, an annual fee is charged to Plan participants and  
12 deducted from their accounts. This annual fee is prorated and deducted  
13 on a quarterly basis.

14           24. The deduction of these administrative expenses from  
15 participant accounts reduces the funds available to participants for  
16 distribution and/or investing and deprives the Plan of funds that  
17 otherwise would have been earned on the amounts deducted.

18           25. At the discretion of Defendants in their fiduciary capacity,  
19 forfeitures may be used to either pay the Plan's expenses or reduce the  
20 Company's contributions to the Plan. Which of these options would be in  
21 the best interests of participants depends on the particular facts and  
22 circumstances present at the time of the allocation decision.

23           26. Using the forfeitures to reduce employer contributions is  
24 always in the best interest of Clorox because that option would decrease  
25 the Company's own contribution costs. This option might also be in the  
26 best interests of participants where there is a risk that Clorox may be  
27 financially unable to satisfy its contribution obligations.

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1           27. Absent a risk that Clorox would be unable to satisfy its  
2 contribution obligations, using forfeitures to pay Plan expenses would be  
3 in the participants' best interest because that option would reduce or  
4 eliminate amounts otherwise charged to their accounts to cover such  
5 expenses.

6           28. In deciding between using forfeitures to benefit Clorox or  
7 using forfeitures to benefit the participants, Defendants are presented  
8 with a conflict of interest in administering the Plan and managing and  
9 disposing of its assets.

10           29. Despite the conflict of interest presented by this decision,  
11 Defendants failed to undertake any investigation into which option was  
12 in the best interest of the Plan's participants and beneficiaries.

13           30. Defendants did not, for example, investigate whether there  
14 was a risk that Clorox would be unable to satisfy its contribution  
15 obligations if forfeitures were used to pay Plan expenses, or evaluate  
16 whether there were sufficient forfeitures to eliminate the Plan expenses  
17 charged to participants and still offset a portion of Clorox's own  
18 contribution obligations, as a prudent person would have done.

19           31. Defendants also failed to consult with an independent non-  
20 conflicted decisionmaker to advise them in deciding upon the best course  
21 of action for allocating the forfeitures in the Plan, as a prudent person  
22 would have done.

23           32. Although ERISA requires fiduciaries to manage the Plan's  
24 assets solely in the interest of participants and although the Plan grants  
25 Defendants discretion to use forfeitures to pay Plan expenses, thereby  
26 reducing or eliminating the amounts charged to participant accounts to  
27 cover such expenses, Defendants have consistently declined to use any of  
28 these Plan assets for such purpose during the putative class period.

1           33. Instead, Defendants have consistently chosen to utilize the  
2 forfeited funds in the Plan exclusively for the Company's own benefit, to  
3 the detriment of the Plan and its participants, by using these Plan assets  
4 solely to reduce Company contributions to the Plan.

5           34. For each year of the putative class period, Clorox had  
6 sufficient cash and equivalents on hand to satisfy its contribution  
7 obligations to the Plan. Nevertheless, throughout that period,  
8 Defendants consistently based the decision of how to allocate forfeitures  
9 solely on Clorox's own self-interests and failed to consider the interests  
10 of the Plan and its participants.

11           35. In 2017, Company non-elective contributions to the Plan were  
12 reduced by \$1,023,000 because of Defendants' decision to reallocate all  
13 forfeitures to benefit the Company, and no forfeitures were used to pay  
14 any part of the \$635,067 in Plan expenses deducted from participant  
15 accounts.

16           36. In 2018, Company non-elective contributions to the Plan were  
17 reduced by \$700,000 because of Defendants' decision to reallocate all  
18 forfeitures to benefit the Company, and no forfeitures were used to pay  
19 any part of the \$958,497 in Plan expenses deducted from participant  
20 accounts.

21           37. In 2019, Company non-elective contributions to the Plan were  
22 reduced by \$1,181,000 because of Defendants' decision to reallocate all  
23 forfeitures to benefit the Company, and no forfeitures were used to pay  
24 any part of the \$1,143,682 in Plan expenses deducted from participant  
25 accounts.

26           38. In 2020, Company non-elective contributions to the Plan were  
27 reduced by \$650,000 because of Defendants' decision to reallocate all  
28 forfeitures to benefit the Company, and no forfeitures were used to pay



1 any part of the \$1,160,889 in Plan expenses deducted from participant  
2 accounts.

3 39. In 2021, Company non-elective contributions to the Plan were  
4 reduced by \$840,000 because of Defendants' decision to reallocate all  
5 forfeitures to benefit the Company, and no forfeitures were used to pay  
6 any part of the \$1,266,666 in Plan expenses deducted from participant  
7 accounts.

8 40. In 2022, Company non-elective contributions to the Plan were  
9 reduced by \$1,315,000 because of Defendants' decision to reallocate all  
10 forfeitures to benefit the Company, and no forfeitures were used to pay  
11 any part of the \$1,273,494 in Plan expenses deducted from participant  
12 accounts.

13 41. In 2023, Company non-elective contributions to the Plan were  
14 reduced by \$1,000,000 because of Defendants' decision to reallocate all  
15 forfeitures to benefit the Company, and no forfeitures were used to pay  
16 any part of the \$1,284,990 in Plan expenses deducted from participant  
17 accounts.

18 42. While Defendants' decisions to reallocate all forfeitures in the  
19 Plan to reduce Company non-elective contributions to the Plan benefitted  
20 Clorox by reducing its own contribution expenses, it harmed the Plan,  
21 along with its participants and beneficiaries, by reducing the amount of  
22 Company non-elective contributions that Clorox promised to make to the  
23 Plan and by causing participants to incur deductions from their  
24 individual accounts each year to cover expenses that could have been  
25 covered in whole or in part by forfeitures.

26 **CLASS ACTION ALLEGATIONS**

27 43. 29 U.S.C. § 1132(a)(2) authorizes any participant or  
28 beneficiary of the Plan to bring an action individually on behalf of the



1 Plan to enforce a breaching fiduciary's liability to the Plan under 29  
2 U.S.C. § 1109(a).

3 44. In acting in this representative capacity and to enhance the  
4 due process protections of unnamed participants and beneficiaries of the  
5 Plan, as an alternative to direct individual actions on behalf of the Plan  
6 under 29 U.S.C. § 1132(a)(2), Plaintiff seeks to certify this action as a  
7 class action on behalf of all Clorox Plan participants and beneficiaries.  
8 Plaintiff seeks to certify the following class:

9 All participants and beneficiaries of the Clorox Plan  
10 from October 18, 2017 through the date of judgment,  
11 excluding Defendants and members of the Committee of  
12 the Clorox Plan.

13 45. This action meets the requirements of Rule 23 and is  
14 certifiable as a class action for the following reasons:

15 a. The class includes over 9,000 members and is so large  
16 that joinder of all its members is impracticable.

17 b. There are questions of law and fact common to the class  
18 because Defendants owed fiduciary duties to the Plan and to all  
19 participants and beneficiaries and took the actions alleged herein as to  
20 the Plan and not as to any individual participant. Thus, common  
21 questions of law and fact include the following, without limitation: Who  
22 are the fiduciaries liable for the remedies provided by 29 U.S.C. §  
23 1109(a)? Did the fiduciaries of the Plan breach their fiduciary duties to  
24 the Plan with respect to their management and allocation of Plan assets?  
25 What are the losses to the Plan resulting from each alleged breach of  
26 ERISA? What Plan-wide equitable and other relief should the Court  
27 impose to remedy Defendants' alleged breaches?

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1 c. Plaintiff's claims are typical of the claims of the class  
2 because Plaintiff was a participant of the Plan during the class period  
3 and all participants in the Plan were harmed by the same alleged  
4 misconduct by Defendants.

5 d. Plaintiff is an adequate representative of the class  
6 because he was a participant of the plan during the class period, has no  
7 interests that conflict with any other members of the class, is committed  
8 to the vigorous representation of the class, and has engaged experienced  
9 and competent attorneys to represent the class.

10 e. Prosecution of separate actions for these breaches of  
11 fiduciary duties by individual participants and beneficiaries would create  
12 the risk of (A) inconsistent or varying adjudications that would establish  
13 incompatible standards of conduct for Defendants with respect to their  
14 discharge of their fiduciary duties to the Plan and personal liability to  
15 the Plan under 29 U.S.C. § 1109(a), and (B) adjudications by individual  
16 participants and beneficiaries regarding these breaches of fiduciary  
17 duties, and remedies for the Plan would, as a practical matter, be  
18 dispositive of the interests of the participants and beneficiaries not  
19 parties to the adjudication or would substantially impair or impede those  
20 participants' and beneficiaries' ability to protect their interests.  
21 Therefore, this action should be certified as a class action under Rule  
22 23(b)(1)(A) or (B).

23 46. A class action is the superior method for the fair and efficient  
24 adjudication of this controversy because joinder of all participants and  
25 beneficiaries is impracticable, the losses suffered by individual  
26 participants and beneficiaries may be small and impracticable for  
27 individual members to enforce their rights through individual actions,  
28 and the common questions of law and fact predominate over individual

1 questions. Given the nature of the allegations, no class member has an  
 2 interest in individually controlling the prosecution of this matter, and  
 3 Plaintiff is aware of no difficulties likely to be encountered in the  
 4 management of this matter as a class action. Alternatively, then, this  
 5 action may be certified as a class under Rule 23(b)(3) if it is not certified  
 6 under Rule 23(b)(1)(A) or (B).

7 47. Plaintiff's counsel, Hayes Pawlenko LLP, will fairly and  
 8 adequately represent the interests of the class and is best able to  
 9 represent the interests of the class under Rule 23(g).

### 10 **FIRST CLAIM**

#### 11 **BREACH OF FIDUCIARY DUTY OF LOYALTY**

#### 12 **(29 U.S.C. § 1104(a)(1)(A))**

13 48. Plaintiff realleges and incorporates herein by reference each  
 14 and every allegation contained in the preceding paragraphs of this  
 15 Complaint as though fully set forth herein.

16 49. Pursuant to 29 U.S.C. § 1104(a)(1)(A), Defendants were  
 17 required to discharge their duties to the Clorox Plan "solely in the  
 18 interest of the participants and beneficiaries" and "for the exclusive  
 19 purpose of: (i) providing benefits to participants and their beneficiaries;  
 20 and (ii) defraying reasonable expenses of administering the plan."

21 50. Defendants have continually breached this duty of loyalty  
 22 with respect to their control and management of the Plan's assets  
 23 throughout the class period by choosing to use forfeitures in the Plan for  
 24 the benefit of the Company rather than solely in the interest of the  
 25 participants and beneficiaries.

26 51. Instead of acting solely in the interest of Plan participants by  
 27 using forfeitures in the Plan to reduce or eliminate the administrative  
 28 expenses charged to their individual accounts, Defendants chose to use

these Plan assets for the exclusive purpose of reducing Clorox's non-elective contributions to the Plan, thereby saving the Company millions of dollars at the expense of the Plan, which received fewer non-elective contributions than Clorox promised to pay the Plan, and its participants and beneficiaries, who were forced to incur avoidable expense deductions to their individual accounts.

52. In making this decision, Defendants had a conflict of interest and were motivated primarily or exclusively by Clorox's own self-interest rather than the interests of the Plan's participants and beneficiaries, which Defendants failed to consider.

53. As a direct and proximate result of Defendants' fiduciary breaches described herein, the Plan suffered injury and loss for which they are personally liable and are subject to appropriate equitable relief, pursuant to 29 U.S.C. § 1109, including, without limitation, the disgorgement of all ill-gotten profits to Defendants resulting from the breach of their duty of loyalty.

54. Each Defendant knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each Defendant is liable for the losses caused by the breach of its co-fiduciary under 29 U.S.C. § 1105(a).

## **SECOND CLAIM**

### **BREACH OF FIDUCIARY DUTY OF PRUDENCE**

#### **(29 U.S.C. § 1104(a)(1)(B))**

55. Plaintiff realleges and incorporates herein by reference each and every allegation contained in the preceding paragraphs of this

FIRST AMENDED CLASS ACTION COMPLAINT

1 Complaint as though fully set forth herein.

2 56. Pursuant to 29 U.S.C. § 1104(a)(1)(B), Defendants were  
3 required to discharge their duties with respect to the Clorox Plan “with  
4 the care, skill, prudence, and diligence under the circumstances then  
5 prevailing that a prudent man acting in a like capacity and familiar with  
6 such matters would use in the conduct of an enterprise of a like character  
7 and with like aims.”

8 57. Defendants have continuously breached their duty of  
9 prudence under 29 U.S.C. § 1104(a)(1)(B) throughout the class period by  
10 declining to use forfeitures in the Plan to reduce or eliminate the  
11 administrative expenses charged to participant accounts and instead  
12 using such Plan assets to reduce the amount of non-elective contributions  
13 Clorox promised to make to the Plan.

14 58. In deciding how to allocate forfeitures, Defendants utilized an  
15 imprudent and flawed process. Despite the conflict of interest presented  
16 by this decision, Defendants failed to undertake any reasoned and  
17 impartial decision-making process to determine whether using  
18 forfeitures in the Plan to reduce the Company’s own contribution  
19 expenses, as opposed to the administrative expenses charged to  
20 participant accounts, was in the best interest of the Plan’s participants  
21 or was prudent, and failed to consider whether participants would be  
22 better served by another use of these Plan assets after considering all  
23 relevant factors.

24 59. In making this decision, Defendants had a conflict of interest  
25 and were motivated primarily or exclusively by Clorox’s own self-interest  
26 rather than the interests of the Plan’s participants and beneficiaries.

27 60. By declining to use forfeitures in the Plan to reduce or  
28 eliminate the administrative expenses charged to participant accounts,

1 and instead using such Plan assets to reduce the Company's own  
 2 contribution expenses, Defendants caused the Plan to receive fewer  
 3 contributions that would otherwise have increased Plan assets and  
 4 caused participants to incur expense deductions from their individual  
 5 accounts that would otherwise have been covered in whole or in part by  
 6 forfeitures.

7 61. As a direct and proximate result of Defendants' fiduciary  
 8 breaches described herein, the Plan suffered injury and loss for which  
 9 Defendants are personally liable and are subject to appropriate equitable  
 10 relief, pursuant to 29 U.S.C. § 1109, including, without limitation, the  
 11 disgorgement of all ill-gotten profits to Defendants resulting from the  
 12 breach of their duty of prudence.

13 62. Each Defendant knowingly participated in the breach of the  
 14 other Defendants, knowing that such acts were a breach, enabled other  
 15 Defendants to commit a breach by failing to lawfully discharge its own  
 16 fiduciary duties, knew of the breach by the other Defendants and failed  
 17 to make any reasonable effort under the circumstances to remedy the  
 18 breach. Thus, each Defendant is liable for the losses caused by the breach  
 19 of its co-fiduciary under 29 U.S.C. § 1105(a).

### 20 **PRAYER FOR RELIEF**

21 For these reasons, Plaintiff, on behalf of the Plan and all similarly  
 22 situated Plan participants and beneficiaries, respectfully requests that  
 23 the Court:

- 24 • find and declare that Defendants have breached their
- 25 fiduciary duties as described above;
- 26 • find and adjudge that Defendants are personally liable to
- 27 make good to the Plan all losses to the Plan resulting from
- 28 Defendants' breach of fiduciary duties, and to otherwise

1 restore the Plan to the position it would have occupied but  
 2 for Defendants' breach of fiduciary duties;

- 3 • order the disgorgement of all assets and profits secured by  
 4 Defendants as a result of Defendants' breach of fiduciary  
 5 duties;
- 6 • determine the method by which Plan losses under 29  
 7 U.S.C. § 1109 should be calculated;
- 8 • order Defendants to provide all accounting necessary to  
 9 determine the amounts Defendants must make good to the  
 10 Plan under 29 U.S.C. § 1109(a);
- 11 • surcharge against Defendants and in favor of the Plan all  
 12 amounts determined by such accounting;
- 13 • remove the fiduciaries who have breached their fiduciary  
 14 duties and enjoin them from future ERISA violations;
- 15 • certify the class, appoint Plaintiff as a class representative,  
 16 and appoint Hayes Pawlenko LLP as class counsel;
- 17 • award to Plaintiff and the class their attorneys' fees and  
 18 costs under 29 U.S.C. § 1132(g)(1) and the common fund  
 19 doctrine;
- 20 • order the payment of interest to the extent it is allowed by  
 21 law; and
- 22 • grant other equitable or remedial relief as the Court deems  
 23 appropriate.

24 DATED: November 12, 2024

**HAYES PAWLENKO LLP**

25  
 26 By: /s/Kye D. Pawlenko  
 Attorneys for Plaintiff